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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

Steven DeWayne Bond,

Petitioner,

v.

United States of America,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF THE RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. (hereafter "NAPO"), including its 501(c)(3) affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, submits this brief in support of the Respondent United States of America.[1] NAPO seeks to affirm the decision of the U.S. Court of Appeals for the Fifth Circuit, which affirmed the trial court's admission into evidence of a "brick" of methamphetamine, which served as the basis for the Petitioner's conviction.

NAPO is a national non-profit organization, representing state and local law enforcement officers in the United States. It is a coalition of police associations and unions that serves to advance the interests and legal rights of law enforcement officers through education, legislation, and advocacy of the fundamental due process and workplace rights of officers. NAPO represents 4,000 law enforcement organizations, with 250,000 sworn law enforcement officers and 11,000 retired officers. NAPO represents directly and indirectly (through statewide organizations) approximately 775 law enforcement officer organizations, having almost 61,000 sworn law enforcement officers, in Arizona, California, and Texas, three of the four States bordering the U.S.-Mexico border, which are likely to be the most affected by the Court's decision in this case.

NAPO's members have a significant interest in the important issues of law before this Court, as the impact of the Court's decision will directly impact their ability to effectively enforce the law. Officers are sworn to enforce the criminal laws, including the laws pertaining to importation, transportation and

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[1]Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of the brief.

possession of illegal drugs. They must investigate potential drug violations and the means by which those drugs are transported, utilizing every appropriate and reasonable method available, in order to interdict these drug shipments and apprehend those committing these offenses.

WRITTEN CONSENT OF THE PARTIES

Counsel of record for both the Petitioner and the Respondent have consented in writing to the filing of this *amicus curiae* brief, pursuant to Supreme Court Rule 37.3(a). These letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

The *amicus curiae* adopts the factual statement as set forth in the Respondent's brief in opposition to the petition for a writ of certiorari, which was filed with this Court on September 3, 1999. What follows is a shorter narrative of the facts and proceedings.

On July 17, 1997, the Petitioner, Steven DeWayne Bond, was a passenger onboard a Greyhound bus traveling through Texas, when it was stopped by Border Patrol agents at the Sierra Blanca permanent Border Patrol checkpoint.[2] Subsequently, Border Patrol Agent Cesar Cantu diverted the bus into the secondary checkpoint traffic lane to conduct an immigration inspection. Agent Cantu boarded the bus and began checking the immigration status of each of the passengers, working his way from the front of the bus to the back. Upon reaching the back of the bus, Agent Cantu was satisfied that all of the passengers were lawfully present in the United States.

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[2] *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), upheld the reasonableness of the Border Patrol's use of permanent checkpoints for the purpose of briefly questioning vehicle occupants about citizenship and immigration status. Therefore, the stop of the bus and the Border Patrol agent's presence on the bus are not at issue in this case.

As Agent Cantu returned toward the front of the bus to exit, he touched and squeezed the luggage stored on the racks above the seated passengers. Agent Cantu squeezed one particular piece of luggage, a soft-sided green canvas bag located in the overhead luggage bin above Petitioner's seat. The agent noticed that the bag contained a hard "brick-like" object that he suspected was narcotics. Agent Cantu inquired as to the owner of the bag, and the Petitioner admitted that the bag belonged to him. The Petitioner consented to a search of its contents, which revealed a "brick" of methamphetamine weighing 1.34 pounds.

Agent Cantu placed the Petitioner under arrest and advised him of his Miranda rights. The Petitioner subsequently told Agent Cantu that he was transporting the methamphetamine from California to Little Rock, Arkansas, for delivery there. The Petitioner then repeated this confession to another law enforcement officer later that same day. Consequently, the Petitioner was indicted for conspiracy to possess and possession with intent to distribute methamphetamine.

Prior to trial, the Petitioner moved to have the methamphetamine suppressed as the fruit of an illegal search. The district court denied the motion. The Petitioner then waived his right to a jury trial, and the district court found him guilty on both counts. The Petitioner appealed the district court's denial of his motion to suppress the methamphetamine to the U. S. Court of Appeals for the Fifth Circuit, which affirmed the district court's holding. *United States v. Bond,* 167 F.3d 225 (5th Cir. 1999).

SUMMARY OF ARGUMENT

I

The Fourth Amendment prohibits warrantless intrusions of an individual's privacy only where the expectation of privacy is legitimate, in other words recognized by society as reasonable. Because an individual's expectation of privacy is subjective, it

varies according to the circumstances under which the expectation arises. Courts have generally recognized that the privacy interest of individuals in transit on a bus, train, or airplane is substantially less than that attached to a fixed dwelling. This is because "[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." *Katz v. United States*, *infra*.

An individual who knowingly exposes the exterior of his or her bags of luggage to being physically touched by other persons on a common carrier does not have a reasonable expectation of privacy that the exterior of the luggage would not be held, handled, manipulated, or otherwise touched by others. Therefore, the Petitioner in this case did not have a reasonable expectation of privacy in the bag which he placed in the overhead compartment on the bus. The agent's touching of the Petitioner's luggage under these circumstances is a minimal intrusion which is not a search for purposes of the Fourth Amendment.

II

The Border Patrol agent's actions in this case comported with the public interest in and need for effective law enforcement, a factor considered in applying the Fourth Amendment's prohibition on unreasonable searches. Stopping the distribution of illegal drugs, once smuggled into the United States from Mexico or elsewhere, is a major duty of law enforcement officers.

It is commonly known that drug cartels have immense resources with which to conduct this smuggling and trafficking and can adapt quickly, using different means of transport, not only to smuggle drugs into the United States but also to distribute them within the country. Drug traffickers are adaptable, reacting to interdiction successes by shifting routes and changing modes of transportation, to which law enforcement agencies must react. This Nation's war on drugs must be unrelenting and diligent, and will necessarily involve the touching of luggage on buses, trains,

and airplanes, all frequently used methods of transportation for unlawful drugs.

Accordingly, the very minimal intrusion by the Border Patrol agent in this case was reasonable under the Fourth Amendment, because the Petitioner's privacy interest in the outside of his luggage was negligible, as compared to the public interest in effective law enforcement in the "war on drugs", including the utilization of effective investigative measures.

ARGUMENT

I. A passenger on a common carrier does not have an objectively reasonable expectation of privacy in the outside of soft-sided luggage placed in an overhead luggage rack, because the luggage is exposed to handling and touching by the public. Therefore, a law enforcement officer's minimal intrusion of touching or other handling of such a bag of luggage does not constitute a search and is thus reasonable under the Fourth Amendment.

The Fourth Amendment to the United States Constitution states, in pertinent part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches an seizures, shall not be violated . . . ." U.S. Const. amend. IV. When interpreting these words, this Court has uniformly held that:

> ... the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable", a "reasonable", or a "legitimate expectation of privacy" that has been invaded by government action. This inquiry ... embraces two discrete questions. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy. ... The second question is

> whether the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.

Smith v. Maryland, 442 U.S. 735, 740 (1979).

Hence, because an individual's expectation of privacy is subjective, it varies according to the circumstances under which the expectation arises. *Id.* at 740. While the Constitution does protect against warrantless intrusions, it does so only where the individual's expectation is legitimate. *United States v. McDonald*, 100 F.3d 1320 (7th Cir. 1996). Indeed, this Court has held that under some circumstances, this expectation is significantly lowered. For example, in *United States v. Martinez-Fuerte,* this Court held that "one's expectation of privacy in an automobile ... [is] significantly different from the traditional expectation of privacy and freedom in one's residence. 428 U.S. 543, 561 (1976) (citing *United States v. Ortiz*, 422 U.S. 891 at 896 n.2 (1975), and *Cardwell v. Lewis*, 417 U.S. 583, 590-591 (1974)(plurality opinion)).

With respect to the issues presented in the instant case, this Court has " 'affirmed that a person possesses a privacy interest in the *contents* of personal luggage that is protected by the Fourth Amendment.' " *McDonald,* 100 F.3d at 1324 (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)) (other citations omitted). However, courts have "generally recognized that the privacy interest of people who are in transit [i.e., on a bus, train, or airplane] on 'public thoroughfares [is] substantially less than those that attach to a fixed dwelling'", *Id.* 100 F.3d at 1324 (quoting *United States v. Rem*, 984 F.2d 806 (7th Cir. 1993), cert. denied, 510 U.S. 913 (1993)) (other citations omitted), because, in part, "[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967).

The courts have consistently refused to use a bright line

rule to determine what constitutes a search for the purposes of the Fourth Amendment. Rather, they have chosen to analyze each case individually, analyzing and weighing the defendant's expectation of privacy, the degree of intrusiveness of the search, and the totality of the circumstances in order to make their determination in "luggage" cases.

Under a circumstance similar to the instant case, the Sixth Circuit applied the "reasonable expectation of privacy" test to determine whether a police officer's touching of the outside of a passenger's bag, which was located in an overhead compartment on a Greyhound bus, constituted a violation of the Fourth Amendment. *United States v. Guzman*, 75 F.3d 1090, 1092 (6th Cir. 1996). In so doing, the court stated:

> We find that there is a meaningful distinction between an individual's privacy interest in the interior and the exterior of his luggage. While a passenger on a common carrier has a reasonable expectation that the contents of his luggage will not be exposed absent consent or a search warrant, we join the Eight Circuit and hold that this expectation of privacy does not extend to the exterior of or airspace surrounding the luggage.

Id. at 1095. Consequently, the court held that, because there is no reasonable expectation of privacy in the exterior of luggage while it is on the luggage rack, the police officer's initial touch of the exterior of the bag did not constitute an "unreasonable search in violation of the Fourth Amendment." *Id.*

In a similar case, the Fifth Circuit focused on the degree of intrusiveness of the police officer's contact with defendant's luggage. *United States v. Lovell*, 849 F.2d 910 (5th Cir. 1988). In *Lovell*, United States Border Patrol agents were conducting surveillance at the El Paso International Airport. The agents removed Lovell's luggage from the conveyor belt and felt along

the sides of the bags. After one of the agents felt a mass in Lovell's bag, the agent compressed the sides of the bags to expel air, and noticed that the expelled air smelled like marijuana and talcum powder. Consequently, the agents subjected Lovell's bags to a canine sniff, the result of which reinforced their initial suspicions of the presence of marijuana. Lovell moved to suppress the evidence alleging that "the agents' actions constituted an improper search under the fourth amendment." *Id.* at 911. Lovell's motion raised the following questions, in the context of the instant case: " ([1]) did the agent's compression of Lovell's bags constitute either a search or a seizure; and ([2]) did the agents' sniff of Lovell's bags constitute a search?" *Id.* at 911-912.

The Fifth Circuit applied a "degree of intrusiveness" test and held that a light press of the hands along the outside of a suitcase is [not] sufficiently intrusive to constitute a search in violation of the Fourth Amendment. *Id.* at 913. Explaining further, the *Lovell* court stated:

> Some investigative procedures designed to obtain incriminating evidence from the person are such minor intrusions upon privacy and integrity that they are not generally considered searches or seizures subject to the safeguards of the fourth amendment.

849 F.2d at 913 (quoting *Bouse v. Bussey*, 573 F.2d 548, 550 (9th Cir. 1977)). Applying the same "degree of intrusiveness" test, the *Lovell* court also held that subjecting defendant's luggage, located in a public place, to a sniff by a trained canine did not constitute a search within the meaning of the Fourth Amendment, because a canine sniff, like an officer's touching and squeezing of the outside of a bag, "does not require opening the luggage." It "does not expose noncontraband items that would otherwise remain hidden from public view", and does not "subject [the owner of the property] to the embarrassment and inconvenience entailed in a less discriminate and more intrusive investigative

search" because the information obtained is limited. *Id.* at 914. The court concluded that the police officer acted in accordance with the passenger's legitimate expectation that his bag would be moved or handled.

In hearing a case markedly similar to the case at bar, the Seventh Circuit also held that a police officer's touching of the outside of a passenger's bag did not constitute a search for purposes of the Fourth Amendment. *United States v. McDonald*, 100 F.3d 1320 (7th Cir. 1996). In *McDonald*, police officers boarded a bus during a layover at a bus station, after the passengers had exited. As the officers walked down the aisle of the bus, they pushed and felt the outside of pieces of luggage in the overhead compartment. In so doing, one of the officers felt a hard brick like shape in each of two soft sided-bags. The officer suspected that the objects were drugs, and asked another officer for his opinion. That officer also suspected that the objects were drugs. The officers did not remove the bags, but instead, exited the bus. The passengers re-boarded the bus, after which time the officers re-boarded and asked all of the passengers to whom the suspicious bags belonged. No one claimed ownership, so the officers considered the bags abandoned, opened them, and discovered eleven kilogram bricks of cocaine. Subsequently, the officers determined that McDonald owned the bags and placed her under arrest. *Id.* at 1323.

In McDonald appeal of the denial of her motion to suppress the cocaine as evidence, she argued that the police officers' contact with the exterior of her luggage, while it was in the overhead rack, constituted an illegal search under to the Fourth Amendment. *Id.* at 1323-24. The appellate court recognized that people in transit on public thoroughfares have a substantially less expectation of privacy than those in fixed dwellings, and that " '[w]hat one knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.' " *Id.* at 1325 (quoting *California v. Greenwood*, 486 U.S. 35, 41, 108 S. Ct. 1625, 1629 (1988)). In this context, the court addressed the

questions of whether McDonald had a reasonable expectation of privacy in her luggage, and whether the officers' actions infringed on that privacy. *See id.* at 1325. The court considered the following factors: 1) the defendant was on a common carrier; 2) she placed her bags in an overhead rack that was accessible to other passengers; and 3) it was very likely that the other passengers would move, touch or push her bags. *Id.* at 1326. The Seventh Circuit panel concluded:

> [The defendant] knowingly and voluntarily exposed the exterior of her bags to being physically touched by other persons ... [Accordingly] she did not have a reasonable expectation of privacy that the exterior of her luggage would not be felt, handled, or manipulated by others.

McDonald, 100 F.3d at 1326.

The court analyzed the police officer's actions towards defendant's luggage. It focused on the degree of intrusiveness the police officers used in handling defendant's bags, holding:

> The type of investigation employed ... was tailored to reveal only limited information without displaying the contents of the bags to anyone. Specifically, as with the canine sniff ... the physical touching and feeling of [defendant's] soft-sided luggage by an experienced detective, who over the years had acquired extensive knowledge of illicit drug trafficking, was not likely to reveal much information beyond raising to a high degree the officer's suspicion that the bags contained drugs ...

Id. at 1326. The court also considered the fact that the officers did not move the bags when they initially touched them. In

addition, the court held that the police officer's "touching of the luggage was no more intrusive than the now routine x-raying of all carry-on luggage at airports." *Id.* at 1327.

Hence, the appellate court in *McDonald* affirmed the district court's denial of the defendant's suppression motion, holding that the defendant did not have an expectation of privacy in the bags she placed in the overhead rack, and that the officers' touching of those bags was not a search for purposes of the Fourth Amendment. *Id.* at 1326. S*ee also United States v. Gault*, 92 F.3d 990 (10th Cir. 1996) (holding that "the officer's manner of handling the bag was the sort that a traveler . . . might expect"), and *United States v. Most*, 876 F.2d 191 (D.C. Cir. 1989) (holding that the officer did not handle the defendant's bag in a manner consistent with his expectations as a passenger).

In the instant case, the Border Patrol agent did no more than the officers in *McDonald, Guzman, and Lovell*. Upon boarding the bus, the agent began checking identifications for proof of citizenship or permanent residency. Once satisfied, he started to exit the bus, touching and squeezing the luggage in the overhead compartment as he exited. When he squeezed Petitioner Bond's bag he felt a hard brick-like object and asked Petitioner Bond if he could search his bag. Petitioner Bond agreed and the Border Patrol agent found a brick of methamphetamine.

Therefore, for the foregoing reasons, Petitioner Bond had no reasonable expectation of privacy in a bag which he placed in an overhead compartment on a common carrier. The Border Patrol agent's initial contact with Petitioner Bond's bag was minimal and unintrusive, designed only to reveal contraband. The agent's contact with the bag was no more intrusive than the potential contact which could have occurred by any passenger on the bus. Thus, the methamphetamine was discovered pursuant to an effective and constitutional method of investigation, which left intact Petitioner Bond's Fourth Amendment right to be free from unreasonable searches and seizures.

II. In determining what is reasonable under the Fourth Amendment, the individual's right to privacy is balanced against the need for effective law enforcement. To circumvent drug interdiction efforts near the border or on the open seas, drug traffickers resort to various modes of transportation, depending on where law enforcement is placing the greatest pressure, based on available resources. As a means of uncovering drugs covertly transported via common carriers, effective law enforcement requires that law enforcement officers be able to touch or handle items in transport, which are open to the public's view, touch, and handling.

The reasonableness of a search and seizure under the Fourth Amendment depends on a balancing between the individual's right of privacy and the public's interest in effective law enforcement. In addition to being constitutionally valid, the Border Patrol agent's actions in this case comported with current law enforcement needs.

Stopping the importation of illegal drugs into the United States is a major duty of law enforcement officers to combat the ever increasing quantities of unlawful drugs that are being smuggled into the United States from Mexico, as recently confirmed in the following news story:

> Mexico City — Cocaine and marijuana seizures inside the southwestern U.S. border and along Mexico's Pacific coast have escalated dramatically in the past two years, alarming U.S. law enforcement authorities who say Mexican traffickers are sending greater quantities and larger loads of drugs into the United States. ... Between 1991 and 1998, seizures have jumped from 113 tons to 720 tons [of cocaine, for example]. ...
>
> ...
>
> The rising number of seizures reflects not only

> greater smuggling activity but also dramatic increases in drug production in Columbia and Mexico, according to U.S. officials and reports from law enforcement agencies. U.S. authorities estimated that they capture 10 to 15 percent of all drugs smuggled into the country. While many officials credited improved coordination among U.S. law enforcement agencies for the increase in seizures, they said the trend clearly indicates more drugs are arriving in the United States.
>
> ...
>
> "The drug groups are flexible and innovative and are using ever more sophisticated and well-organized counter-surveillance and counterintelligence," according to a new U.S. government intelligence assessment. "They are constantly ... identifying and explaining law enforcement predictability, patterns, weaknesses, vulnerabilities and routines."

Molly Moore, *Drug Busts Rise on Mexican Border*, WASHINGTON POST (online), November 29, 1999, at 1 & 2. In fact, experts estimate that 50 to 70 percent of the cocaine smuggled into the United States is transported by land through Mexico and usually across the southwest border. General Accounting Office, *Drug Control: Observations and Elements of the Federal Drug Control Strategy*, Letter Report, 3/14/97, GAO/GGD-97-42.

Moreover, it is common knowledge that drug cartels have immense resources and vast networks with which to conduct this smuggling and trafficking and can adapt quickly using different means of transport.

> Drug traffickers are adaptable, reacting to interdiction successes by shifting routes and changing modes of transportation. Large

> international criminal organizations have extensive access to sophisticated technology and resources to support their illegal operations. The United States must surpass traffickers' flexibility, quickly deploying resources to changing high-threat areas. Consequently, the U.S. Government designs coordinated interdiction operations that anticipate shifting trafficking patterns.

Executive Office of the President, United States of America, *1999 National Drug Control Strategy*, excerpt from Part IV, "A Comprehensive Approach", Chapter 7, "Reducing the Supply of Illegal Drugs".[3]

Drug traffickers are increasingly utilizing buses to transport drugs, and if law enforcement efforts are to be effective, this mode of transporting drugs must be made more difficult through such efforts.

> Given the unfortunate realities of today's world, where law enforcement authorities must combat a steady influx of illicit drugs . . . It is not surprising that over the last few decades our society has accepted increased security measures . . . at many locations such as airports, courthouses, hospitals, and even schools. In light of these realities, we agree with other courts of appeal that have held that the reasonable expectation of privacy inherent in the contents of luggage is not compromised by a police officer's physical touching of the exterior of luggage left exposed in the overhead rack of a bus.

McDonald, 100 F.3d at 1325.

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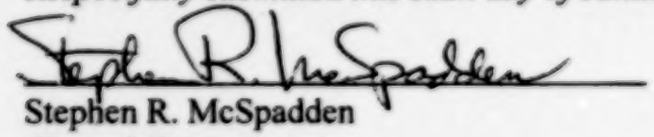
[3]This report is found at the following Internet web site: <www.whitehousedrugpolicy.gov/policy/99ndcs> on the Internet.

In summary, the privacy rights of individuals under the Fourth Amendment must be balanced against the needs of law enforcement. To effectively fulfill the awesome responsibility of enforcing the Nations' laws and keeping the peace, the balance must occasionally tip in the favor of law enforcement, especially when the intrusion on a person's privacy is so minimal that it does not qualify as unreasonable under the Fourth Amendment. Consequently, it is imperative that federal, state, and local law enforcement officers have effective investigatory measures at their disposal; touching bags exposed to the public on a common carrier is one such investigatory measure.

CONCLUSION

Amicus curiae urges the Court to take into account this legitimate societal interest in detecting shipments of illegal drugs on public carriers of transport, and then to hold that a law enforcement officer's touching of the outside of a bag of luggage, placed in a public space on a common carrier and open to feel, touch, or other handling by the public, does not intrude on a reasonable expectation of privacy under the Fourth Amendment. To hold otherwise would be tantamount to giving any illicit drug a free, unfettered bus ride within the United States, a price society should not have to pay. Therefore, we respectfully request that the Court affirm the decision of the Fifth Circuit.

Respectfully submitted this sixth day of January 2000,



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